

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X

3 UNITED STATES, :

4 Petitioner :

5 v. : No. 01-1067

6 WHITE MOUNTAIN APACHE TRIBE. :

7 - - - - - X

8 Washington, D. C.

9 Monday, December 2, 2002

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10: 03 a. m.

13 APPEARANCES:

14 GREGORY G. GARRE, ESQ., Assistant to the Solicitor

15 General, Department of Justice, Washington, D. C. ; on
16 behalf of the Petitioner.

17 ROBERT C. BRAUCHLI, ESQ., Tucson, Arizona; on behalf of
18 the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	GREGORY G. GARRE, ESQ.	
4	On behalf of the Petitioner	3
5	ROBERT C. BRAUCHLI, ESQ.	
6	On behalf of the Respondent	32
7	REBUTTAL ARGUMENT OF	
8	GREGORY G. GARRE, ESQ.	
9	On behalf of the Petitioner	59
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:03 a.m.)

JUSTICE STEVENS: The Court will hear argument
in United States against the White Mountain Apache Tribe.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE PETITIONER

MR. GARRE: Thank you, Justice Stevens, and may
it please the Court:

In 1960, Congress declared the former Fort
Apache military post to be held in trust for the White
Mountain Apache Tribe. The specific --

QUESTION: What condition was it in in 1960?
Was it basically like it is today, or has it gotten worse?
What was it like then?

MR. GARRE: Well, it -- it's certainly much
older today. It's about 40 years older today. The
condition the -- the legislative history doesn't discuss
the condition of the fort in particular detail.

It's important to recognize that the military
fort was built for temporary use -- today, some -- almost
a century ago, and in 1960 had been built for temporary
use, you know, more than 50, 60, or 70 years ago. So it
wouldn't at all have been surprising if there had been a
state of decay in 1960.

1 And of course, when Congress passed the 1960
2 statute, there was no indication at all -- certainly not
3 on the face of the statute, or in the legislative history
4 that's contained in respondent's lodging -- that it had in
5 mind a historic preservation goal, or that it had in mind
6 that -- that it would require the Secretary of the
7 Interior to undertake the enormous financial
8 responsibility of having to restore a century-old fort.

9 QUESTION: -- making use today of a portion of
10 the structures there for the school and administrative
11 needs?

12 MR. GARRE: Absolutely, Justice O'Connor.
13 The -- the vast majority of the buildings and historic
14 district area of Fort Apache are used today for school and
15 administrative purposes. The Bureau of --

16 QUESTION: Are those maintained in some fashion
17 for that use by the Federal Government?

18 MR. GARRE: They are. As we point out in note 1
19 of our reply brief, the Department of the Interior has
20 spent more than \$3 million over the past decade or
21 15 years on repair and maintenance projects at the fort.
22 It's also true that the tribe itself has engaged in
23 historic restoration efforts at the fort with the support
24 of the Bureau of Indian Affairs and the Department of the
25 Interior, and with the assistance of private, State, and

1 even -- in some cases -- Federal tax dollars.

2 QUESTION: Well, the U.S. Government does hold
3 the property in trust for the tribe -- the White Mountain
4 Tribe. Right?

5 MR. GARRE: That's true. Just like the U.S.
6 Government --

7 QUESTION: And what basic responsibility does
8 that entail, would you say, the fact that the Government
9 is a trustee?

10 MR. GARRE: Well, when Congress places land in
11 trust for Indians, it has two well-settled meanings that
12 this Court has recognized. First, it places a restraint
13 on the alienation of property, and second, it immunizes
14 the property from State taxation. And if you look at
15 pages 6 and 7 of the respondent's lodging, that indicates
16 that in 1958, when there was discussion about what to do
17 with Fort Apache, the tribe itself encouraged the
18 Department to have Congress place the land in trust so
19 that it was in a nontaxable status like the surrounding
20 reservation lands.

21 Now, we know from the first Mitchell decision
22 decided by this Court that simply placing property in
23 trust does not in itself create a substantive right to
24 money damages.

25 QUESTION: But there was an enormous difference

1 in that case in that the Indians managed the land. Under
2 the General Allotments Act, the idea was to make the
3 individual owner autonomous. Here, I think it's not
4 disputed that this land has been operated by the U. S.
5 Government, and the U. S. Government has exclusive control.

6 MR. GARRE: Justice Ginsburg, that -- that may
7 be true in the factual sense, but the 1960 act -- that is,
8 that the Federal Government is using the property, but the
9 1960 act -- quite unlike the General Allotment Act --
10 specifically reserves to the Government the right to use
11 the property for Government uses. And in that respect, we
12 think the trust relationship created by the statute in
13 this case is much more limited than the one that was
14 created by the statute in Mitchell I, and the existence of
15 factual Federal control cannot in itself give rise to a
16 damages action under the Tucker Act.

17 QUESTION: Can you just explain one small point
18 to -- to me? I know what "school purpose" means. What is
19 "administrative"? Is that administrative in connection
20 with the school, or some free-floating administration?

21 MR. GARRE: Well, I -- I think generally, the
22 "administrative use" can refer to executive uses, and is a
23 very broad term. In that respect, I think it's
24 instructive that Congress used that term. Nevertheless,
25 I think that -- that "administrative purposes" has to be

1 read with school purposes, and can be read to refer to
2 both uses for storage and the like, and also for
3 administrative purposes used by the Bureau of Indian
4 Affairs to undertake activities at Fort Apache or -- or on
5 the surrounding reservation. So in that respect, it's
6 administrative for the purpose of the Department of the
7 Interior, who operates activities there through the local
8 agent of the Bureau of Indian Affairs.

9 Now --

10 QUESTION: Mr. Garre, is -- is any of the -- or
11 let me ask you an open-ended question. How much of the
12 property which is the subject of this claim was within the
13 Government's control throughout this period, and how much
14 of it was not?

15 MR. GARRE: Oh, well, our position would be that
16 the vast majority, if not all, was -- well, that's not
17 true. The -- the vast majority of the property has been
18 within the Government's control, but it's important to
19 recognize that the court of appeals' decision remands for
20 building-by-building, in a sense, trial on the existence
21 of Federal use and control. And the tribe does have
22 access to the Fort Apache property. The tribe is there.
23 The tribe even has a -- a cultural museum that it operates
24 on the property. So it's -- it's not as though this is a
25 Federal enclave --

1 QUESTION: Well, is the tribe making -- is the
2 tribe making a monetary claim with respect to property
3 which it has had in its control, as distinct from the
4 Government's, during this period?

5 MR. GARRE: If you look at appendix A to the
6 tribe's complaint, which -- which has a detailed building-
7 by-building analysis of the ways in which the building
8 don't meet certain requirements, I think it's fair to say
9 the tribe's damages claim extends to all the buildings at
10 Fort Apache and that, therefore, it may extend to
11 buildings over which the Federal Government is not -- have
12 any active use or -- or control.

13 But we don't think that a damages action can be
14 brought against the United States based on some fact-
15 bound, manipulable notion of Federal control.

16 QUESTION: No. I -- I realize that. I realize
17 that.

18 MR. GARRE: Under the Tucker Act -- and this
19 Court emphasized it in the Mitchell decisions, and it's
20 emphasized it in other decisions -- a substantive right to
21 damages against the United States -- which, after all, is
22 a right to damages against the public fisc -- has to be
23 grounded in a source of substantive law.

24 QUESTION: Well, if -- can we talk just for a
25 moment about the analogy? And we'll call it just that,

1 the area of private trusts.

2 I -- I take it that usually a trustee, who has
3 the obligation to repair buildings for the beneficiaries
4 so they don't fall into disrepair, does so at the
5 beneficiaries' expense.

6 MR. GARRE: That -- that's true.

7 QUESTION: And that -- that didn't seem to
8 figure into your argument. Again, it -- it struck me,
9 as -- reading the briefs -- that that was an argument --
10 you don't really make that argument.

11 MR. GARRE: Well --

12 QUESTION: Is that because the trustee here is
13 both the beneficiary -- is -- is a co-beneficiary of the
14 trust?

15 MR. GARRE: That is true and it's much unlike
16 the typical common law trust, but the -- the most
17 fundamental reason, Justice Kennedy, is we don't think
18 that a court should have to plumb through the common law
19 to determine whether or not Congress established a right
20 to damages against the United States in this case.

21 And it's also true -- if you look at the common
22 law, the first thing you -- you're met with -- with -- is
23 with the general rule that you can't get breach of trust
24 damages against the sovereign. So you'd have to get --
25 not only you'd have to get around the courts --

1 QUESTION: Well, but that -- but, I mean, that's
2 the whole purpose of the Tucker Act. I mean, to -- to
3 plead sovereign immunity begs the question. That's
4 exactly the question before us.

5 MR. GARRE: Well, and I agree, Justice Scalia,
6 and we think that that question should be answered by
7 looking to the act of Congress on which the tribe relies,
8 which is the 1960 act.

9 QUESTION: Well, but it would have seemed to me,
10 following Justice Scalia's question and my own, that if
11 the law of trusts gave a clear indication one way or the
12 other that there was a liability, then the Tucker Act
13 analysis might -- might be different accordingly.

14 MR. GARRE: With respect, I disagree. And I
15 think the Mitchell I case establishes that. In
16 Mitchell I, both the Court of Claims and the dissenters on
17 this Court reasoned that because the General Allotment Act
18 placed land, quote, in trust, that therefore one could
19 look to the common law and therefore one could import into
20 the Tucker Act all the liabilities that would follow
21 against a private trustee, even liabilities that would
22 result in damages actions. A majority of this Court
23 rejected that analysis.

24 Now, in Mitchell II, the Court specifically
25 affirmed the result in Mitchell I, and it emphasized that

1 Mitchell II was different because in that case, the Court
2 had statutes and regulations that created specific
3 management duties that could be fairly interpreted as
4 mandating the payment of compensation for the breach of
5 those duties.

6 Now, the court of appeals recognized at page 18a
7 of the petition appendix -- and the -- even the tribe
8 recognizes on page 11 of its brief -- that the 1960 act
9 doesn't set forth any specific management duties on the
10 part of the Government.

11 QUESTION: Do you think the Government could
12 have just destroyed the property or the structures on the
13 land?

14 MR. GARRE: Well, I -- Justice Stevens, I think
15 that the notion that the Government would destroy the
16 property, if it did so in a way that was clearly
17 inconsistent with the terms of the act --

18 QUESTION: Let me put it another way. Do you
19 think they had a duty not to destroy the property?

20 MR. GARRE: That -- that duty, if it exists,
21 comes from ordinary tort principles and from principles of
22 just compensation under the Fifth Amendment. And those
23 claims haven't been asserted in this case. This case
24 involves a breach of trust action, a claim for damages
25 based on the alleged breach of trust which the tribe

1 grounds in the 1960 act, and --

2 QUESTION: No, I understand. But part of the
3 question we have is to what extent did the Government
4 assume duties beyond immunizing the property from State
5 taxation and preventing its alienation. Did they have any
6 additional duties? And I'm not clear on whether you've
7 told me they had a duty not to destroy it or not.

8 MR. GARRE: Not under -- under the 1960 act, the
9 statute in this case. Now, if the Government had --

10 QUESTION: But did they -- from any source, did
11 they have a duty not to destroy it?

12 MR. GARRE: I -- I think -- I think it would,
13 Justice Stevens. If I could respond by -- by maybe
14 running through some hypotheticals --

15 QUESTION: You'd help me if you responded yes or
16 no, to be honest with you.

17 (Laughter.)

18 MR. GARRE: Yes, it would under the Fifth
19 Amendment to the Constitution if Congress sold the fort to
20 someone else, or if Congress destroyed the fort. Then the
21 tribe might have a claim for just compensation. The tribe
22 has referred to some just compensation cases in its brief,
23 but it hasn't brought a just compensation claim in this
24 case.

25 The tribe also might seek to bring a damages

1 action under the Federal Torts Claimed Act -- Tort Claims
2 Act for some kind of destruction of property. The tribe
3 hasn't brought that --

4 QUESTION: So you are -- to this extent, you're
5 differing from counsel's position before the Federal
6 Circuit, because I believe at that level, counsel was
7 asked if the United States could dynamite all the
8 buildings to the ground with no liability to the tribe,
9 and the answer was yes.

10 MR. GARRE: Well, it's -- it's not clear to me
11 the context in which that question came up.

12 But I also think that it's true that if the
13 Secretary decided that it was necessary to level a
14 building because it proves an attractive nuisance to
15 school children, or because it was desirable to build a
16 more -- newer and better educational facility at the fort,
17 that the 1960 act would authorize the Secretary to do
18 that.

19 But -- but we do recognize that there are other
20 principles in this area stemming from the Fifth Amendment,
21 a source of substantive law, stemming possibly from the
22 Federal Torts Claims Act, another source of substantive
23 law, which aren't invoked in this case, which might be
24 implicated based on the Government's management of the
25 property.

1 QUESTION: Well, how about Mitchell II?

2 MR. GARRE: Well, in Mitchell II, Justice
3 O'Connor, the statutes and regulations there, which --
4 which the Court described as a pervasive, statutory scheme
5 governing Indian timber management, provided specific
6 fiduciary management duties that could be fairly
7 interpreted as -- as mandating payment of compensation.
8 They -- they specifically govern the generation of profits
9 or proceeds for the Indian tribe, and in that case, the
10 Court held that the violation of those duties, grounded in
11 a statute or regulation, gave rise to a money damages
12 action under the Tucker Act. This case is --

13 QUESTION: Well, how would -- how would you
14 describe the duties the United States has as trustee with
15 relation to this property? How would you describe the sum
16 total of its duties?

17 MR. GARRE: I think the -- the principal duties
18 are the ones that the Court has always recognized when it
19 places land in trust: not to alienate the land and -- and
20 it immunizes it from State taxation.

21 QUESTION: In -- in effect, I think what you're
22 saying is that there are no trust duties. There's a
23 peculiarity here. The word trust in -- as you're using it
24 in the argument, simply has those two implications: don't
25 give it away and place it in a -- in a condition or -- or,

1 by virtue of the word trust, it is in a condition to avoid
2 taxation.

3 MR. GARRE: Well --

4 QUESTION: I think you're saying that there are
5 no fiduciary duties beyond that. If there is any duty
6 beyond that, it's got to come from the Constitution, or
7 it's got to come from a specific provision of -- of a
8 statute creating a duty not necessarily as -- as that of a
9 trustee, but simply as a statutory duty. Isn't that
10 correct?

11 MR. GARRE: That's correct when the tribe comes
12 into court under the Tucker Act and asserts a claim for
13 monetary damages against the United States Treasury.
14 We're dealing against an area of sovereign immunity where
15 the United States is immune from damages for breach of
16 trust unless Congress --

17 QUESTION: But I think you're saying two things,
18 and they -- they mesh perfectly. One, you're making sort
19 of an immunity argument. Two, you're saying there is no
20 trust responsibility whatsoever on the part of the trustee
21 except not to alienate.

22 MR. GARRE: Not enforceable in an action for
23 monetary damages. Of course, in this area, the Court has
24 recognized --

25 QUESTION: So you are conceding that there --

1 that there might be equitable remedies based on -- on a
2 theory of fiduciary duty?

3 MR. GARRE: It's conceivable that there would be
4 an equitable remedy based on a violation of statute, not
5 on equitable duties. This is -- this is a realm --

6 QUESTION: So that if -- may -- may I just, you
7 know --

8 MR. GARRE: Yes. Sorry.

9 QUESTION: -- pursue the example that Justice
10 Stevens used? If the Government said, 30 days from now,
11 we are going to blow up all the buildings, there would be
12 a -- an -- an equitable remedy based upon fiduciary duty?

13 MR. GARRE: I think in that situation, Justice
14 Souter, the tribe might be able to bring an injunction --
15 injunctive action perhaps under the APA claiming that that
16 use of the property, the destruction of it, would exceed
17 the scope of the Government's use right under the 1960
18 act.

19 QUESTION: Well, is that -- I -- I don't
20 understand what you're saying.

21 MR. GARRE: That -- that would be under statute,
22 not on some --

23 QUESTION: So -- so you're saying that would not
24 be based on fiduciary responsibility?

25 MR. GARRE: Well --

1 QUESTION: If -- if it exceeded the Government's
2 use right, what -- what other obligation -- what would be
3 the source of -- of a -- of an obligation if -- if it was
4 not fiduciary duty?

5 MR. GARRE: I think it could be a property
6 interest as well. I mean, we acknowledge that the 1968 --
7 the 1960 act gives this tribe --

8 QUESTION: But the property interest takes into
9 consideration the trust relationship, doesn't it?

10 MR. GARRE: Well, it doesn't necessarily have
11 to. The Court has had many cases brought by Indian tribes
12 claiming just compensation under the Fifth Amendment of --
13 of property, which -- at least in some management -- some
14 aspects would have a trust in it. Overlapping all this
15 area is the notion that the Government has political and
16 moral responsibility to the Indian tribes, and the Court
17 has recognized that throughout its decisions since --

18 QUESTION: Well, but -- just -- just to put
19 Justice Souter's question back before you -- and my own:
20 What trust duties does the United States have in addition
21 to not alienating the property, and making sure that it's
22 immune from State taxation? I think your answer is it has
23 no fiduciary obligations at all. There may be some
24 obligations under the Fifth Amendment to protect property,
25 et cetera, but as a trustee, it has no fiduciary

1 obligations other than the ones that are mentioned.

2 MR. GARRE: The United States has general
3 fiduciary obligations to the Indian tribes that this
4 Court has recognized. But the Court has never
5 recognized -- and I think it rejected the notion in the
6 Mitchell I case that --

7 QUESTION: Well, but do those general
8 obligations with reference to this property import any
9 duty other than the duty not to alienate and to ensure
10 that it's immune from State taxation?

11 MR. GARRE: Not a duty and certainly not a duty
12 that's enforceable in an action for monetary damages.

13 QUESTION: Well, I would have thought there
14 might well be a duty for the trustee -- the U.S.
15 Government acting as trustee here -- not to lay waste to
16 the property held in trust for the tribe --

17 MR. GARRE: Well --

18 QUESTION: -- not to affirmatively lay waste to
19 it or -- or allow something to happen that just the
20 ordinary care would suggest should not happen.

21 MR. GARRE: Justice O'Connor, that duty
22 certainly is not expressed in the terms of the 1960
23 statute, and -- and, of course, there are other
24 statutory --

25 QUESTION: Well, except to the extent that the

1 statute does say, all right, this property, Fort Apache,
2 is to be held by the U.S. Government in trust for the
3 tribe. And maybe that conveys some notion, in addition to
4 not alienating it, not laying waste to it. Now, whether
5 what's done fits that I don't know. Maybe ordinary wear
6 and tear isn't covered, but --

7 MR. GARRE: I -- I don't think that that
8 position would be consistent with the Court's ruling in
9 Mitchell I, where the Court rejected the notion that the
10 use of language, in trust, subjects the United States to
11 all the liabilities of a private trustee.

12 QUESTION: Well, there's a little more here than
13 was true in Mitchell I. It's specific property, hold it
14 in trust, and the Government can use it for a school or
15 administrative needs, but there -- there's something more
16 than was in Mitchell I.

17 MR. GARRE: With respect, I think that there --
18 there's less, Justice O'Connor, that -- that Congress
19 specifically carved out of the trust relationship the
20 right of the Government to use the property for the
21 Government's purposes.

22 QUESTION: Mr. Garre, there -- there is one
23 significant difference, and that is the control element.
24 Mitchell I stressed that the control was with the
25 allottee. Mitchell II has a whole paragraph that says

1 what's key is who has control. And as I read it, it was
2 that these specific instructions were an indication that
3 the U.S. had exclusive control, but that the real thing
4 was the control, who has control of this property.

5 MR. GARRE: But -- but there's a key difference,
6 Justice Ginsburg, between this case and Mitchell II with
7 respect to the question of control. In Mitchell II, the
8 Court emphasized throughout its decision and -- and
9 discussed the statutes and regulations in detail for more
10 than four pages. The control stemmed from specific
11 statutory and regulatory duties that were created by
12 Congress in that case, and the Court found that the
13 violation of those specific duties, which could be
14 fairly -- fairly interpreted as mandating compensation,
15 gave rise to a damages claim against the United States.

16 In this case, the tribe can't point to a single
17 statute or regulation, and the only statute it relies in
18 this case -- in this Court is the 1960 act that creates
19 any --

20 QUESTION: Well, then you're -- you're reading
21 it differently than I have just set it out. As I take the
22 Court to have said control is key, and these specific
23 regulations show that there is indeed control, that the
24 United States runs the show. But the nature of this
25 trust, there wouldn't be any instructions. You wouldn't

1 expect there to be detailed instructions. The question is
2 who was in control.

3 MR. GARRE: Well, there -- there is no specific
4 management duty in this case. Instead of the situation in
5 Mitchell I or Mitchell II, Congress gave --

6 QUESTION: Can I interrupt with just one -- one
7 question? The trust here refers not only to the land but
8 to the improvements. Doesn't that make a difference? In
9 a -- in a private situation wouldn't that normally create
10 in the -- the trustee a duty to ensure against fire, and
11 to take care of the improvements as opposed to just bare
12 legal title to the property?

13 MR. GARRE: It -- it might, Justice Stevens, but
14 I think the reference to that also is important in terms
15 of Congress' express delegation to the Secretary the duty
16 to use all of the trust property, the land and the
17 buildings, to operate an Indian school there, which is
18 the -- the use that -- that the property had been put
19 since the 1920s.

20 QUESTION: So in your -- in your opinion, if
21 this statute had added the words, and if the Government
22 does take control, it shall use ordinary prudence and
23 skill to preserve the property, then they'd have a claim

24 MR. GARRE: It -- it certainly would be a
25 much --

1 QUESTION: Is that yes or no.

2 MR. GARRE: -- different case.

3 QUESTION: No. Yes or no.

4 MR. GARRE: I -- I think -- if I can analyze

5 that claim I -- I think they -- they might have a claim,

6 Justice Breyer.

7 QUESTION: When you say might, I'm just

8 imagining the same statute, everything that's gone on this

9 morning, and it says if they take control, they shall use

10 ordinary skill and prudence to preserve the property.

11 MR. GARRE: The --

12 QUESTION: The answer then is yes or no?

13 MR. GARRE: Well, I think it would be no,

14 Justice Breyer, and if I could explain why.

15 QUESTION: It would be no even then. Then what

16 have we been arguing about --

17 MR. GARRE: Well --

18 QUESTION: -- because, I mean, everybody has

19 been asking you whether that can be implied here? And my

20 impression was you said yes. I mean, if it --

21 MR. GARRE: Congress creates a number of duties.

22 And Congress has legislative -- of course, in the area of

23 historic preservation, and it creates duties that the

24 courts below found are procedural in nature.

25 QUESTION: And so if they said, and by the way,

1 if in fact they take control, the trustee -- i.e., the
2 United States -- has a duty when they take control to use
3 ordinary skill and prudence to preserve the property.

4 MR. GARRE: Then the statute -- they would --
5 they would have a specific management duty. And then the
6 question --

7 QUESTION: And so the answer is then they would
8 have -- they could -- then they'd win. Right? If it said
9 that.

10 MR. GARRE: I -- I think they might under that
11 situation.

12 QUESTION: Okay, fine.

13 MR. GARRE: But there's a second question under
14 the Court's cases that the Court would have to answer it,
15 and that's case two, and that's whether or not that
16 specific statutory duty can be fairly interpreted as
17 mandating the payment of compensation.

18 QUESTION: And it adds, and indeed if they
19 violate this, they have to pay a lot of money.

20 MR. GARRE: Of -- of course, in that situation.

21 QUESTION: Okay. Then we're all right.

22 MR. GARRE: Of course, in that situation --

23 QUESTION: So our issue here -- what I'm getting
24 at is our issue then is whether that word control implies
25 those latter words --

1 MR. GARRE: Well --

2 QUESTION: -- that were, in fact, left out.

3 That's the question. Is that right or not?

4 MR. GARRE: I don't think it's the question

5 because the word control doesn't appear anywhere in the

6 face of the statute.

7 QUESTION: I'm sorry. I -- I was reading --

8 it's subject to the right of the Secretary of Interior to

9 use any part of the land in improvements.

10 MR. GARRE: Right.

11 QUESTION: So I -- we have to decide right to

12 use -- does that imply those words that are left out.

13 MR. GARRE: Right.

14 QUESTION: It didn't say he had to use it, did

15 it?

16 MR. GARRE: No, not at all.

17 QUESTION: No.

18 QUESTION: So in order to say he controlled it,

19 you -- you would have to say he --

20 QUESTION: I misspoke. I'm sorry to have mixed

21 people up.

22 MR. GARRE: Right.

23 QUESTION: I meant right to use. Does it imply

24 the words that are not there when they use it?

25 MR. GARRE: Yes. And -- and I think -- and if I

1 could be more clear, I think that we think the Court's
2 cases and the Tucker Act -- and -- and we think can also
3 look to cases in the section 1983 context -- establishes a
4 two-step inquiry. First, has Congress created a specific
5 duty on the Government's part, and second, can that duty
6 be fairly interpreted as mandating a payment of
7 compensation breached?

8 QUESTION: How does it work in other areas of
9 real estate law, where suppose I turn my beach house over
10 to a friend and he has a wild party and destroys it? Do I
11 have a claim against him if I had no knowledge he would do
12 such a thing?

13 MR. GARRE: Conceivably you might have a tort
14 claim, Justice Breyer, but that's not a claim that's --

15 QUESTION: So normally is it the case when you
16 give or lease or give property to other people if they
17 wreck the place, contrary to expectation, we imply into
18 those promises or words that they had to take reasonable
19 care?

20 MR. GARRE: Possibly as a breach of a contract
21 or a tort --

22 QUESTION: All right.

23 MR. GARRE: -- violation.

24 QUESTION: If we normally do that in the law,
25 why would we not do the same thing here where, indeed, in

1 addition to what you normally have, you have this word
2 trust and special relationship?

3 MR. GARRE: I think the Court refused to do that
4 in the Mitchell I case because there, the Court used the
5 language, in trust, and it refused to --

6 QUESTION: Well, it wasn't a question of laying
7 waste in Mitchell I, was it? It was just a question of
8 not using the land to its utmost financial benefit.

9 MR. GARRE: Well, that's true, Justice Scalia.
10 And --

11 QUESTION: So the question he's asking you is --
12 is destroying the land.

13 You say in your -- you quote in your brief
14 Austin on trusts to the effect that there is a fundamental
15 difference between a private trust and a public trust.
16 What -- what kind of cases is -- is that -- is that
17 section referring to?

18 MR. GARRE: Well --

19 QUESTION: I mean, suppose I leave my -- my
20 house to the City of Falls Church in trust for the people
21 of Falls Church. What -- what obligations are imposed on
22 the City of Falls Church?

23 MR. GARRE: I think what the -- I mean, there
24 you might have a situation where the question is whether
25 you could enforce obligations against a private individual

1 who left it in trust. Here we're talking about a
2 situation where the --

3 QUESTION: No, no. I'm talking about
4 imposing -- what obligations are imposed upon Falls
5 Church.

6 MR. GARRE: You could impose -- you could --

7 QUESTION: I leave property to Falls Church in
8 trust for the people of Falls Church or in trust for some
9 category of the -- of the people of Falls Church.

10 MR. GARRE: I think the Restatement
11 provisions --

12 QUESTION: The Little League or something.

13 MR. GARRE: -- that we referred to incorporate
14 the doctrine of sovereign immunity in this area, and you
15 could impose possibly --

16 QUESTION: Oh, is that all that -- that Scott on
17 trusts was referring to, just the doctrine of sovereign
18 immunity?

19 MR. GARRE: Well --

20 QUESTION: Because if that's all he was
21 referring to, you know, that's been waived by -- by the
22 statute here.

23 MR. GARRE: No.

24 QUESTION: I thought there was something quite
25 different he was referring to, that the whole nature of a

1 public trust is different from a private trust. If that's
2 not the case, then all of that is quite irrelevant it
3 seems to me.

4 MR. GARRE: I -- I think it's both, Justice
5 Scalia, that the public trust is different in that we
6 don't ordinarily assume that the Government acts in all
7 its capacities as a private trustee. And that's certainly
8 true in the Indian law context. This Court -- there are
9 more than 56 million acres of land that the Government
10 holds in trust. If the Court assumed just by Congress'
11 use of the word in trust, the Government had assumed all
12 the liabilities of -- of a common law trustee, then that
13 would be an enormous potential liability that there's no
14 indication whatsoever Congress ever agreed to assume.

15 QUESTION: Okay, Mr. Garre. You're -- you're
16 arguing that you can't infer from the use of the word
17 trust that all of the obligations and all of the potential
18 liabilities of a private trustee are carried by it. But
19 your argument seems to go, if I understand it, to the
20 other extreme, that the use of the word trust seems to
21 imply no obligation and no responsibility unless it is
22 followed by a specific delineation of what those
23 responsibilities are.

24 And my question is -- Justice Breyer a minute
25 ago was saying, well, what would be different if we added

1 certain words. And my question is what would we -- be
2 different if we subtracted certain words on your theory?
3 What if the statute had not included the words, in trust?
4 Wouldn't your argument be exactly the same?

5 MR. GARRE: Under the Tucker Act -- and, of
6 course, the Tucker Act doesn't refer to claims for breach
7 of trust.

8 QUESTION: No, but would you answer my question?
9 Wouldn't you be -- aren't you making the same argument
10 under a statute that says in trust that you would be
11 making under a statute that did not include the words, in
12 trust, at all? Isn't that so?

13 MR. GARRE: Yes. That -- that's true, Justice
14 Souter. But I -- I think --

15 QUESTION: Then you -- what -- what are we to do
16 with the usual canon of construction that we assume that
17 Congress does not use useless words?

18 MR. GARRE: Those words had great effect here.
19 They had the same effect that the words have -- this
20 Court has recognized -- with respect to the alienation of
21 land and with respect to immunization of land to State
22 taxation.

23 QUESTION: Yes. They -- they couldn't alienate
24 under a statute that says the -- the land and et cetera
25 will be held by the United States for the tribe. Taxes

1 couldn't be levied by lesser sovereigns against lands held
2 by the United States under those circumstances.

3 MR. GARRE: Those -- those --

4 QUESTION: It seems to me that the word, in
5 trust, means nothing.

6 MR. GARRE: No. With respect, I would disagree.
7 It has those two settled consequences. We know from
8 pages 6 and 7 --

9 QUESTION: But why would you not have those
10 consequences without those words? It's true if you have
11 those words, the consequences follow. But wouldn't the
12 consequences follow without the words?

13 MR. GARRE: No.

14 QUESTION: And if in fact that's all the
15 Government -- if that's all Congress was getting at, why
16 didn't Congress simply say that instead of using the
17 phrase, in trust, that normally carries enormous
18 implications?

19 MR. GARRE: The -- that -- that line of argument
20 is the argument that we think that the court of appeal --
21 the Court of Claims made in Mitchell I and that the
22 dissenters made in Mitchell I, and we think that the
23 majority of the Court rejected --

24 QUESTION: And -- and Justice Ginsburg has
25 suggested that maybe the -- the significance of that line

1 of argument depends on whether there was or was not
2 control. But I think --

3 MR. GARRE: In the factual sense.

4 QUESTION: -- on your argument, I think what
5 you're telling us is that Mitchell I -- and in any event
6 your argument -- has the implication that those words add
7 absolutely nothing.

8 MR. GARRE: No, no, Justice Souter. That's not
9 the implication of our argument. They do have the
10 accepted meanings. The United States holds land in trust.
11 It is immunized from State taxation. If the tribe itself
12 held it or private Indians held it, it wouldn't be
13 subject -- it would be subject to State taxation.

14 QUESTION: What if the Government of the United
15 States held it?

16 MR. GARRE: Well, it does in this case, and
17 that's the significance of holding it in trust.

18 QUESTION: Yes, and it -- and it would do so
19 under the statute if the words, in trust, weren't used.

20 MR. GARRE: That -- that -- it also has -- in
21 this case it has the effect of making the lands here like
22 the surrounding reservation lands. And -- and again, I
23 think pages 6 and 7 of the tribe's lodging helps to make
24 that point.

25 If I could reserve the remainder of my time for

1 rebuttal. Thank you.

2 QUESTION: Mr. Brauchli.

3 ORAL ARGUMENT OF ROBERT C. BRAUCHLI

4 ON BEHALF OF THE RESPONDENT

5 MR. BRAUCHLI: Justice Stevens, and may it
6 please the Court:

7 If the Secretary of the Interior had never taken
8 control of these buildings, we would not be here. It
9 would be a -- a bare trust. Simply putting these
10 buildings in trust does not create any fiduciary
11 obligations.

12 But the Secretary did take control. It's not
13 mandatory; it's voluntary. And that's why this case is
14 exactly like Mitchell II. In Mitchell I, there's no nexus
15 between the General Allotment Act and managing a forest.
16 But when you look at the forest management statute,
17 there's a direct nexus from the forest management statutes
18 to control of the forest, and when you control the forest,
19 to the exclusion of the tribe, then you are responsible as
20 a fiduciary.

21 QUESTION: But the control -- the control here
22 was not control given for the benefit of the tribe. To
23 the contrary, it was control given for the United States'
24 own use. It seems to me that's -- that's quite different.
25 I agree that if -- if you -- you say the United States

1 shall control it for the benefit of -- of the tribe, you
2 might have a different case. But that's not what this
3 statute said. It said the United States shall control it
4 for its -- its use, running an Indian school and so forth.

5 MR. BRAUCHLI: Justice Scalia, I respectfully
6 disagree.

7 QUESTION: Administrative purposes.

8 MR. BRAUCHLI: The -- the benefit to the
9 tribe -- Congress stripped the United States of all fee
10 simple, absolute title and gave 100 percent beneficial
11 title to the tribe. The United States has no retention of
12 ownership whatsoever. They have a use easement, and
13 that's all they have. A very limited right. And the
14 benefit is what Congress said, and Congress said, we're
15 going to take this fort, which we established to kill
16 Apaches and imprison them, and we're going to give it to
17 the White Mountain Apache Tribe. And they gave it, and it
18 has value. It has 35 buildings. It has 7,500 acres. Now
19 it's only -- you know, we're down. We're talking
20 about 288 acres.

21 QUESTION: I thought the fort was to protect
22 white settlers. But you -- you know, you can describe it
23 the way you like.

24 MR. BRAUCHLI: Well, it was to protect white
25 settlers --

1 QUESTION: Okay.

2 MR. BRAUCHLI: -- but from my clients'

3 viewpoint, it was established to conquer them. So that's

4 what I'm here for, my client.

5 QUESTION: Yes, I understand.

6 MR. BRAUCHLI: And there was a benefit. And

7 the -- the benefit said -- it's been postponed because the

8 United States Secretary reserved a very limited right to

9 use it for a school --

10 QUESTION: I -- I want to make I understand your

11 argument. If the Government had, after this statute was

12 enacted, said, you know, we really don't have any interest

13 at all in these buildings, and just let them go to waste,

14 but they didn't use them in any way, there would be no

15 liability?

16 MR. BRAUCHLI: Absolutely none. Before

17 March 18, 1960, they could have --

18 QUESTION: Why? I mean, what -- what kind of a

19 theory is that? If -- if the Government occupies the

20 buildings and -- and by that preserves them in a small

21 sense, they're falling apart, but at least it's better

22 than a complete -- complete abandonment, they're liable,

23 but if they completely abandon them, they're not. I -- I

24 just don't understand that.

25 MR. BRAUCHLI: Justice Kennedy, if I understood

1 your question, I thought you meant before March 18, 1960
2 when they owned it --

3 QUESTION: No, no. I mean after 1960.

4 MR. BRAUCHLI: Oh.

5 QUESTION: I thought your initial argument was
6 that after 1960, once the Government took control by,
7 i.e. -- by that I thought you meant possessing the
8 buildings --

9 MR. BRAUCHLI: Occupying.

10 QUESTION: -- it had a duty, but that if it had
11 not possessed the buildings or occupied the buildings, it
12 would have no duty.

13 MR. BRAUCHLI: Yes, that is true. That's what
14 I'm saying. The -- the fact is that they occupied --

15 QUESTION: I -- I just don't understand that.

16 MR. BRAUCHLI: They occupied and physically
17 controlled the buildings. If -- for instance, we are not
18 filing a claim for the four buildings. There's only 4
19 buildings out of 35 being used for a school right now.
20 The -- four. And so we're not filing a claim for those,
21 and they just -- they just sprang for 3 million and a half
22 dollars to fix those up. But the other buildings that
23 they have used and occupied and destroyed and -- and
24 some -- they've demolished four -- those are the buildings
25 that we have a claim for.

1 And we say we're not charging you for trespass.
2 We're not charging you for reasonable wear and tear,
3 but --

4 QUESTION: Well, since 1960, did the U.S. use
5 some of the buildings other than it's now using?

6 MR. BRAUCHLI: Yes, and the reason that they
7 have fallen off from use is because the enrollment went
8 from 500 students down to about 80.

9 QUESTION: Well, if there are 35 buildings on
10 the premises, how many did the Government use since 1960?

11 MR. BRAUCHLI: The Government used all of the
12 buildings. They physically occupied them.

13 QUESTION: All of them

14 MR. BRAUCHLI: Yes.

15 QUESTION: Physically occupied all 35?

16 MR. BRAUCHLI: Yes, they did, and they used them
17 for storage and for schools.

18 QUESTION: Since 1960.

19 MR. BRAUCHLI: Yes. And so it's been under the
20 exclusive control. But as --

21 QUESTION: And now it physically occupies 4 of
22 the 35.

23 MR. BRAUCHLI: Four for school and about six for
24 its administrative use.

25 QUESTION: Mr. Brauchli, would you give me your

1 view on the hypothetical that I asked your -- your
2 colleague on the other side? Suppose I leave property to
3 the City of Falls Church. The City of Falls Church takes
4 possession. It's not occupied by anybody else. And
5 it's -- it's in trust for the people of Falls Church. The
6 City of Falls Church takes possession. It doesn't do
7 anything with the land. It just leaves it there. Now, in
8 the law of trusts, that -- that would be wasteful, and the
9 trustee would have to use the land in order to generate
10 income for the people of Falls Church, or at least do
11 something for the people of Falls Church.

12 Do you think the City of Falls Church would be
13 in breach of trust? Do you know of any lawsuits against
14 cities or any public entities that -- that have accepted
15 land or other property in trust?

16 MR. BRAUCHLI: If -- if the land is being -- as
17 I understand the question, you -- you are leaving this to
18 Falls Church and as a beneficiary --

19 QUESTION: It's a lot. It's a great big lot,
20 and I say, you know, I'd like to leave it to the City of
21 Falls Church and I do. And the City of Falls Church
22 doesn't do anything with it, just leaves it there. It
23 could have built a -- you know, an apartment building and
24 gotten a lot of income for the city coffers. It could
25 have built a baseball diamond or whatever. It just leaves

1 the lot there.

2 MR. BRAUCHLI: That is not our situation --

3 QUESTION: Is that a lawsuit?

4 MR. BRAUCHLI: I don't know because --

5 QUESTION: Well, but that's crucial to your case

6 here --

7 MR. BRAUCHLI: I don't --

8 QUESTION: -- it seems to me.

9 MR. BRAUCHLI: Well, I don't think --

10 QUESTION: I think it goes to the point of

11 whether a public trust is the same thing as a private

12 trust.

13 MR. BRAUCHLI: Well, this is a private trust.

14 I think this is a private trust, and it's not a public

15 trust. But it's --

16 QUESTION: Even if it were, I guess the real

17 analogy would be it goes to the City of Falls Church to be

18 held in trust for the public to be used as a school for as

19 long as they want it, and thereafter to go to the

20 archeological society for preservation. And now they run

21 it down as a school, and the question would be can the

22 archeological society now sue them for the loss. I don't

23 know. Maybe it can.

24 QUESTION: Well, this -- this doesn't say that

25 it goes to the archeological society --

1 QUESTION: It goes to the tribe.

2 QUESTION: -- or that it goes to the Indians
3 afterwards. It just says, in trust.

4 MR. BRAUCHLI: Justice Scalia, I think you're
5 saying that -- you're talking about a situation where the
6 beneficiary doesn't do anything with the property. If
7 the -- if the -- I think the analogy would be -- that
8 you're making is if the White Mountain Apache Tribe did
9 nothing to their property. Then that's their choice. But
10 if you as the trustee went in there and destroyed the
11 property that you were going to give to the --

12 QUESTION: I'm not talking about destroying it.

13 MR. BRAUCHLI: -- beneficiary of Falls Church,
14 that's our situation.

15 QUESTION: Yes. I'm putting destroying it
16 aside. I'm -- I'm just saying that the City of Falls
17 Church doesn't do anything with it. It does not do what a
18 trustee would normally have to do, and that is produce
19 income from it, or -- or use it in -- in some way that
20 will benefit the -- the cestui que trust. Okay? It just
21 leaves it fallow.

22 MR. BRAUCHLI: And they're a trustee.

23 QUESTION: And -- and I don't know of any
24 lawsuits in which in such a situation a citizen could say,
25 you know, I'm -- I'm a citizen of Falls Church, and you

1 are wasting my -- my trust estate.

2 QUESTION: No. I don't even know of one that
3 says I have my forest which I leave to the people of Falls
4 Church, and lo and behold, 20 years later, that forest is
5 a wreck. They cut every tree. And I don't know if the
6 citizens of Falls Church can sue there either, but I know
7 the Indians can.

8 MR. BRAUCHLI: I don't -- I think there's a
9 different -- there's -- this Court unanimously last term
10 in the Klamath case said that the fiduciary relationship,
11 the trust relationship, between the United States and the
12 tribes is the primary cornerstone of Indian law. It was a
13 unanimous opinion. There's a special trust relationship
14 between the Indian people and the United States Government
15 and when the United States --

16 QUESTION: But does that -- does that extend to
17 a requirement that the United States spend its monies
18 rather than the tribe's monies to preserve the land?
19 Suppose in this case that some basic erosion systems were
20 needed because the land was eroding, endangering the --
21 the topography, and some simple irrigation rivulets or --
22 or drainage rivulets would -- would save the property.
23 Would the United States have the obligation to perform
24 those -- those repairs?

25 MR. BRAUCHLI: Yes. Yes, they do.

1 QUESTION: At its expense?

2 MR. BRAUCHLI: Yes.

3 QUESTION: What -- what authority do you have

4 for that?

5 MR. BRAUCHLI: Because they --

6 QUESTION: That's -- that's certainly not a -- a

7 trustee doesn't have the duty to repair at his own expense

8 in -- in a private trust.

9 MR. BRAUCHLI: Well, this is not a -- I -- the

10 United States, if they are -- the beneficiary is the

11 tribe, and I think when you have a trustee in control and

12 occupying, they -- according to the treatises I read --

13 read, there's an absolute obligation to protect and

14 preserve the beneficiary.

15 QUESTION: Not at the trustee's own expense.

16 That's the point. The -- the trust itself has to provide

17 the means, the -- the financial wherewithal to make those

18 repairs. This isn't a duty financially imposed on the

19 trustee.

20 MR. BRAUCHLI: Well, I just disagree with that.

21 When the United States is the trustee --

22 QUESTION: Well, you'd have to have some

23 authority. You may disagree, but how -- how do you find

24 it out of trust law?

25 MR. BRAUCHLI: Okay. My authority is the

1 Mitchell II which was a waste case as well as a benefits
2 case because in that case, there was a requirement to
3 manage the forest on a sustained yield basis, and if --

4 QUESTION: All right. If your --

5 QUESTION: Waste -- waste is different.

6 QUESTION: If your answer to me --

7 QUESTION: Waste is different from doing
8 something that costs money, and the money has to come from
9 somewhere. And -- and do you think the United States
10 could sell off a piece of this to private hands in order
11 to obtain the money to renovate these buildings?

12 MR. BRAUCHLI: No, but they did appropriate
13 money --

14 QUESTION: So you're -- you're urging then that
15 ordinary trust law does not apply in the case of a public
16 trust.

17 MR. BRAUCHLI: Well, I think that the trust
18 relationship between the United States and Indian tribes
19 is sui generis.

20 QUESTION: Okay.

21 MR. BRAUCHLI: You cannot import the common law
22 wholesale into a -- this type of situation.

23 QUESTION: Based on your answer you gave to me
24 about the hypothetical about the erosion occurring, it --
25 it would seem to me that if the United States has an

1 affirmative duty in that case, the fact that it occupied
2 or didn't occupy the buildings does not alter its duty to
3 keep those buildings in repair. Its occupancy and use has
4 nothing to do with the case --

5 MR. BRAUCHLI: Well --

6 QUESTION: -- because in my hypothetical they
7 didn't occupy or use the land.

8 MR. BRAUCHLI: Well, the complaint is for -- for
9 damage to the infrastructure for failure to keep up the --
10 the water and sewer system, the electrical system, as well
11 as the buildings that they used and controlled. They had
12 total, exclusive control.

13 QUESTION: But if they didn't -- in Justice
14 Kennedy's question, if the United States didn't use it for
15 administrative and school purposes, then the United
16 States, under the terms of the trust, has no right to hold
17 it because they have this exclusive right of occupancy
18 only for those purposes. And if they just let the -- then
19 it would be -- wouldn't it belong to the tribe?

20 MR. BRAUCHLI: It expires and they -- they said
21 that in the court of appeals below that the -- the circuit
22 judges said, well, can you use it as a uranium dump? And
23 the Department of Justice said, no, because that would be
24 a breach of the trust because we're only allowed to use it
25 for school or administrative purposes. Therefore, a

1 uranium dump would be outside the use allowed.

2 I think waste is a use outside what Congress
3 allowed them, and it's a specific use and it should be
4 construed against the easement. The easements are not
5 wide open.

6 QUESTION: Yes, but I'm not sure you confront
7 the question, and I'm not sure what the answer is. If the
8 waste -- duty to protect waste requires spending some
9 money, whose money do you spend? The trustee's or the
10 trust's? The beneficiary's money or the trustee's money?
11 If you buy an insurance policy, does the trustee pay for
12 out of his own pocket or out of trust assets?

13 MR. BRAUCHLI: Well, I think in this case the
14 United States was obligated to prevent the deterioration.
15 All they have to do is repair -- they have
16 basketball-sized holes in the roof letting rain in which
17 progressively deteriorates -- deteriorates the property.

18 QUESTION: Could the United States have used
19 trust assets to perform that duty?

20 MR. BRAUCHLI: I think they should use their own
21 assets since they're using it rent-free, and they should
22 protect the property because they have --

23 QUESTION: You're saying they should use it.
24 Could they -- in your judgment, could the United States
25 have used trust assets to perform that duty?

1 MR. BRAUCHLI: Yes, the United States' assets.
2 I'm -- are you -- I'm not --
3 QUESTION: That's not my question.
4 MR. BRAUCHLI: Oh, you mean the trust assets.
5 You mean the buildings themselves? I don't -- well, they
6 have collected rents --
7 QUESTION: Could they cut --
8 MR. BRAUCHLI: -- for some of the buildings.
9 QUESTION: Could they cut down some trees and
10 say, we're going to sell off some timber because we've got
11 to raise some money to fix the roof? Would that have been
12 a -- a legitimate use of the property?
13 MR. BRAUCHLI: Of the tribe's timber?
14 QUESTION: Yes.
15 MR. BRAUCHLI: I would say they cannot do that
16 without the tribe's permission.
17 QUESTION: So it's literally got to come out of
18 a pocket of the National Government which has no relation
19 to the tribe's assets is what you're saying.
20 MR. BRAUCHLI: That's what I'm saying.
21 QUESTION: Suppose you -- you rent -- it's
22 rather interesting. I mean, suppose -- suppose that the
23 trustee -- this were an ordinary trust, but the trustee
24 was giving it to a third party to use, which he'd have the
25 right to do under the trust. And the third party didn't

1 repair the basketball-sized holes in the pavilion. How do
2 we decide if it's that third party's responsibility, or if
3 trust assets should have been used? I mean, here I'm
4 thinking that --

5 MR. BRAUCHLI: Well --

6 QUESTION: -- the trustee is both the trustee
7 and the third party himself because he's using it for his
8 own purposes.

9 MR. BRAUCHLI: Well, under landlord and tenant
10 law, the tenant would certainly be liable for the waste,
11 and this Court said that in the Bostwick case.

12 QUESTION: Would the tenant have to repair the
13 holes in the roof?

14 MR. BRAUCHLI: The tenant would be responsible.
15 Any lease of tribal property by a -- a tenant, the -- the
16 duty is to the United States as well as the tribe. And
17 the United States under the leasing regulations has an
18 absolute duty to go in there and protect the -- to protect
19 the value of the property -- and I put that in my brief --
20 the value of the property from a tenant who's injuring
21 that property. So here they're saying we're like a
22 tenant, but we can commit all the waste we want to.

23 QUESTION: What precisely are you asking for?
24 You said -- you started to say something, and then you
25 were asked a question. You said you're not asking for

1 wear and tear. What is the measure of the damages
2 you're --

3 MR. BRAUCHLI: I think the measure of damages
4 would be against the measuring stick of a reasonable
5 trustee in like circumstances in total control of the
6 trust corpus of his beneficiary. And I'm saying it's that
7 amount of damages necessary to bring it up to code, less
8 reasonable wear and tear.

9 QUESTION: So it would be -- that -- that would
10 be the -- 14 million-dollar figure to bring it up to code?

11 MR. BRAUCHLI: Well, that was been altered
12 because the tribe has engaged in a little self-help, and
13 we actually took over five -- five buildings, and we had a
14 grant from the White House Save America's Treasures and
15 the National Endowment of the Humanities and the State of
16 Arizona, and the tribe put 2 million of their own dollars.
17 So I think that figure is more like \$8 million, and
18 that's --

19 QUESTION: But you're still -- what you're
20 talking about is what it would cost to bring this up to
21 historic building preservation level?

22 MR. BRAUCHLI: Not necessarily. Its just a --
23 when you have -- not -- we're not talking about restoring
24 it. We're talking about rehabilitating the buildings and
25 you can keep its historic character and make modifications

1 to it. We're not talking about restoring it and making it
2 into a theme park like the Government suggests. We're
3 talking about bringing it up to code. You can make some
4 modifications to it.

5 The -- the standards are -- the Secretary's
6 standard says if you're going to have properties listed on
7 the National Register of Historic Properties, you can make
8 modifications, but you have to keep the historic
9 character. You can upgrade the electricity. You can
10 repair the roofs. And actually the code is a lot more lax
11 than the Uniform Building Code. The --

12 QUESTION: What -- what is this code? Is it a
13 generally applicable code about things like electric
14 wiring and -- and sound roofs, or --

15 MR. BRAUCHLI: Well, the Bureau of Indian
16 Affairs usually uses the General Services Administration
17 and the Uniform Building Code or the Uniform Code of
18 Building Conservation. That's what the National Park
19 Service --

20 QUESTION: But is that what you --

21 MR. BRAUCHLI: Yes.

22 QUESTION: Is that what you're referring to --

23 MR. BRAUCHLI: Right.

24 QUESTION: -- when you say, the code?

25 MR. BRAUCHLI: Right. And their assessment, the

1 BIA's assessment, in 1998 came out within a few hundred
2 thousand dollars of our assessment of the -- of the cost
3 to make the repairs which they had deferred maintenance
4 basically for 40 years --

5 QUESTION: Mr. Brauchli --

6 MR. BRAUCHLI: Yes.

7 QUESTION: -- I'm -- I'm confused about -- about
8 these buildings that -- that have basketball-sized holes
9 in the roof. The Government is still using these
10 buildings?

11 MR. BRAUCHLI: No, they have not. Because of
12 the deferred maintenance, those buildings are boarded up.

13 QUESTION: Well, then they're not using them
14 anymore. So I mean, you can't argue --

15 MR. BRAUCHLI: Right, and that's --

16 QUESTION: -- that they have -- if they're not
17 using them, you can't say that they're in control of them,
18 and that their being in control requires them to make the
19 repairs. I mean, it --

20 MR. BRAUCHLI: No.

21 QUESTION: Under -- under the -- under the
22 statute, they're not required to use the buildings. They
23 may use the buildings. If they're no longer using them,
24 and they have basketball hole -- size -- -sized holes in
25 the roof, it seems to me you have to come up with some

1 theory other than the Government's continuing control
2 which imposes upon the Government the obligation to repair
3 the buildings.

4 MR. BRAUCHLI: Let me clarify something.

5 QUESTION: All right.

6 MR. BRAUCHLI: The -- the buildings -- when the
7 need expires, their right to be there expires. I'm
8 talking about the -- the boys' dorm now. That's the
9 basketball-sized holes in the roofs.

10 We made a demand. The tribe made a demand for
11 the return of 15 buildings. They said, you no longer need
12 them. Give those buildings back to us. Your -- your
13 right to be there has expired, but you give us the money
14 for the -- to repair those because they're not
15 inhabitable. They used to be. Our experts -- we've spent
16 a lot of money. We have photographs from 1960. We know
17 they were in very good shape in 1960.

18 QUESTION: And what did the Government say? You
19 can't have the buildings, or you can't have the money?

20 MR. BRAUCHLI: They said -- oh, they -- they
21 want to give us the buildings.

22 QUESTION: Okay.

23 MR. BRAUCHLI: They said, you can't have the
24 money.

25 QUESTION: Well, that's exactly right, it seems

1 to me, if the only theory on which they're obliged to
2 repair them is that they're in control of them. They're
3 saying, you know, we're not using them anymore. We don't
4 want to repair them. If you want them, they're yours and
5 you can repair them.

6 MR. BRAUCHLI: They don't own them, and under
7 Mitchell II, this Court said that when the United States
8 is in control of a -- of a resource of a tribe, a -- a
9 fiduciary relationship is established in respect to that
10 resource.

11 QUESTION: No, but isn't your argument that
12 they -- I -- I'm not saying whether you win or lose on it,
13 but isn't your argument that they are obliged to give us
14 the money to repair them because the deterioration took
15 place when they were in control?

16 MR. BRAUCHLI: Yes.

17 QUESTION: Isn't that your point?

18 MR. BRAUCHLI: That is my point which I did not
19 apparently express very well, but that is the point
20 that --

21 QUESTION: You mean they -- they were still
22 using those buildings when the -- when the basketball-
23 sized holes in the roofs appeared?

24 MR. BRAUCHLI: They were using the buildings as
25 the progressive -- it's not a Big Bang Theory about a

1 building falling down.

2 (Laughter.)

3 MR. BRAUCHLI: It's -- it's a progressive
4 deterioration of the buildings. And then when they felt
5 that -- they just started to board them up, and -- and we
6 said, okay, we'll take -- they said -- well, actually,
7 they wrote a letter, said they're yours. And we said,
8 what do you mean they're -- they're ours? With an
9 \$8 million repair bill and you had total control, and you
10 feel you have the right to destroy property that you don't
11 own?

12 And this deprives Congress of the benefit that
13 Congress intended. So here's the executive branch saying,
14 we don't care what Congress gave you. We'll make sure you
15 don't get anything except a -- a pile of rubble. And
16 someone has got to pay for that, and the tribe should not
17 pay for that. And that's the point of the damage claim

18 We went to the Secretary and they said -- after
19 a year of wasting my time at the solicitor's office, they
20 said -- finally, the Special Assistant to the Secretary
21 said, you're going to have to sue us because we're not
22 going to give you the money, and we feel we have the right
23 to destroy this property. And that's -- whether it's
24 demolition by neglect or, as the Department of Justice
25 said in the circuit court below, since you don't have

1 title to this property, contrary to the plain text of the
2 act, we have the right to dynamite it.

3 And somehow it's been held in some kind of
4 purgatory state where what Congress intended to give to
5 the tribe wasn't really intended to give to the tribe.
6 It's a -- it's a plaything for the BIA to play with and
7 destroy.

8 And that's not the fiduciary relationship that
9 this Court has been noted for in -- in respect to a one-
10 on-one relationship. In Nevada versus United States, we
11 said, when it's one on one, a fiduciary relationship and
12 there's a fiduciary obligation incumbent upon the United
13 States when it deals with Indian people.

14 QUESTION: Mr. Brauchli --

15 QUESTION: What about --

16 QUESTION: -- can I ask this factual question?
17 I should know, but I really don't. How long ago did the
18 Government's active use of the buildings cease?

19 MR. BRAUCHLI: It is different depending on the
20 building, and that's why we say we have to go
21 building-by-building. And they have raised the statute of
22 limitations. They said, your claim is premature, in -- in
23 the trial court. Then, in the circuit court they said,
24 it's -- no. They said it's -- you're too late. You
25 didn't -- the statute of limitations will bar your claim

1 So that's still lingering out there.

2 Then, in the -- then in the circuit court of
3 appeals they said, it's not in trust, and therefore we can
4 dynamite it.

5 Then, in their briefs here they say, we control
6 everything and your claim is premature.

7 So they have shifting defenses.

8 Different buildings, because they didn't
9 maintain them, they started sloughing off one-by-one
10 because they --

11 QUESTION: Do you have a theory on when their
12 active use of the buildings ceased?

13 MR. BRAUCHLI: It's -- it goes -- it really does
14 have to go by building-by-building because I would say
15 that --

16 QUESTION: Give me any building. Was it
17 10 years ago? Five years ago?

18 MR. BRAUCHLI: -- in the last 5, 6. The last 6
19 years have been progressive, where they started boarding
20 them up and just stopped --

21 QUESTION: And your theory is that the -- the
22 waste occurred before or after they ceased using some --
23 or some of each?

24 MR. BRAUCHLI: It's -- it's some of each. It's
25 a deteriorating use. We don't ask them to restore

1 pre-1960 condition. We're saying take the 1960 condition,
2 and the waste you committed from 1960 when it's under your
3 control. We don't want them to -- they don't have to
4 restore it back to its -- as they say -- Old West shape.
5 We're just asking it -- for the condition that when we got
6 it from Congress, Congress said, here's the gift. Here is
7 the Fort Apache, but we're going to give the Secretary
8 just a limited use, and when that need expires, then the
9 Secretary has no right because but for that act, the
10 Secretary can't even set foot on that property. It's
11 trespass.

12 QUESTION: Well, is it -- let -- may I also get
13 clear on something that I -- I thought I was clear on but
14 I'm not. Is it your theory that they are responsible for
15 the waste or damage or deterioration that took place up to
16 the point at which they ceased actively to use it, or up
17 to the point at which they relinquished control over it to
18 you? Because I take it those -- for some buildings --
19 will be different -- different dates.

20 MR. BRAUCHLI: Yes. There's -- they maintain
21 that they relinquished some buildings and therefore it's
22 barred by the statute of limitations.

23 QUESTION: No. But what is your theory? Is it
24 that their responsibility is measured by the date at which
25 they ceased to use, or the date at which they relinquished

1 control to you?

2 MR. BRAUCHLI: It was the date when they
3 relinquished control and we accepted it because we refused
4 to accept them without the money to repair them

5 QUESTION: Okay.

6 MR. BRAUCHLI: And they're --

7 QUESTION: So you're saying during part of the
8 period in which the -- the property was just boarded up,
9 their responsibility was still in effect.

10 MR. BRAUCHLI: Yes, because they still kept them
11 on their facility inventory maintenance list, but they
12 didn't get -- they get the maintenance money and they use
13 it for other things other than the --

14 QUESTION: Suppose in -- suppose in 1960 the
15 Government said, here are the buildings. We don't want
16 them. And you said, well, you know, it's -- it's going to
17 cost us a lot of money to keep up these buildings. You're
18 going to have to pay for that. We can't do that. Could
19 the Government then say, well, we have a stand-off, we'll
20 destroy them?

21 MR. BRAUCHLI: Are you talking about after
22 March 18th, or before --

23 QUESTION: This is after the 1960 act was
24 enacted and they had become the trustee.

25 MR. BRAUCHLI: If they never physically occupied

1 those buildings or they stopped using them, it's not their
2 liability. If they walked away from the property in -- on
3 March 18th, 1960, they said, Hey, Congress just gave this
4 to you. We've been using them but we're going to walk
5 away today. No responsibility. None. Because when they
6 were the owner, they can do whatever they want. When the
7 tribe becomes the owner and they -- they take control of
8 the trust corpus, then there's an obligation, the most
9 fundamental, rudimentary, crude fiduciary duty as to --

10 QUESTION: Can -- can the Government terminate
11 this trust anytime it wants?

12 MR. BRAUCHLI: Pardon?

13 QUESTION: Can the Government terminate this
14 trust anytime it wants by executive order?

15 MR. BRAUCHLI: No, it cannot because the
16 executive branch does not have the power to terminate this
17 reservation. Only Congress can.

18 QUESTION: That's -- that's what I thought. The
19 trust remains in effect at all times.

20 MR. BRAUCHLI: But it's -- it'd be only a bare
21 trust, Your -- Your Honor, because if -- once they -- once
22 they relinquish the control and the need is not there,
23 their liability ends. You know, we have taken over the
24 cook's cabin. We've taken over four buildings. Their
25 liability is going to end there because we took them over.

1 We had to use some self-help.

2 QUESTION: What -- what of the Government's
3 argument that this was really an illusory trust? That is,
4 the statute, the 1960 statute, gave the Government the
5 right to use this for -- for school and administrative
6 purposes as long as they wanted to. So at -- looking at
7 it from 1960, that could be forever. They might have
8 wanted to use it as a school forever, and then the tribe
9 would have nothing.

10 MR. BRAUCHLI: Well, the -- to answer that
11 question, Your Honor, the measure of damages always could
12 be measured against a reasonable trustee. If they kept
13 using for 100 years, then of course, there's going to be
14 normal -- you know, even normal wear and tear, but there's
15 still -- that's something for the trial court to sort out
16 as to the measure of damages. I mean, what is
17 reasonable -- what is reasonable to repair, what is
18 reasonable not to under the circumstances. That's --
19 that's a question for the trier of fact as to the measure
20 of damages.

21 But, you know, the reality of the situation is
22 that the need has expired except for about 10 buildings.

23 In this -- I mentioned the Bostwick case because
24 in the Bostwick case, the United States had open, free
25 use -- unrestricted use of a private home, and they --

1 they committed waste. And there was -- and this Court --
2 Court -- they were sued. The United States was sued and
3 the Court said that there's an implied covenant against
4 waste even though the lease is silent as to that duty. And
5 I think the analogy is here in the trust situation.
6 When -- when -- it doesn't matter if the statute doesn't
7 say you have to repair buildings when you're using them.
8 It would be unnatural for a statute to say so.

9 That's all I have, Your Honor.

10 QUESTION: Thank you, Mr. Brauchli.

11 Mr. Garre, you have 1 minute left.

12 REBUTTAL ARGUMENT OF GREGORY G. GARRE

13 ON BEHALF OF THE PETITIONER

14 MR. GARRE: Thank you, Justice Stevens. May it
15 please the Court:

16 The Government is not using the property, and is
17 not required to use the property for the benefit of the
18 tribe as the court of appeals acknowledged at page 14a of
19 the appendix to the petition. It's using the property for
20 its own Government purposes, and in that respect, this
21 case is completely unlike Mitchell II, where the statutes
22 and regulations specifically required the Government to
23 manage the property as an economic resource for the
24 Indians.

25 There are no trust assets to pay for any

1 historic restoration efforts because Congress directed
2 that the property would be used for Government purposes,
3 not for any -- any kind of economic purposes that would
4 generate assets. Congress has a separate regime for
5 historic preservation. It grants millions of dollars each
6 year for historic preservation projects, and as
7 Mr. Brauchli alluded, Congress has granted funds for
8 historic reservation at Fort Apache. The tribe has
9 engaged in its historic preservation efforts there with
10 millions of dollars of private, State, and Federal
11 funding, and the Department of the Interior has put
12 millions of dollars of its own maintenance and repair
13 efforts into the fort.

14 Thank you very much.

15 JUSTICE STEVENS: Thank you, Mr. Garre.

16 (Whereupon, at 11:02 a.m., the case in the
17 above-entitled matter was submitted.)
18
19
20
21
22
23
24
25